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NO. 82-692

In the Supreme Court of the United States

OCTOBER TERM, 1982

SHELL OIL COMPANY AND THE INSURANCE COMPANY OF NORTH AMERICA,

Petitioners

VERSUS

BERNARD WILLIAMS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN G. GOMILA, JR.
Counsel for Petitioners
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
18th Floor—225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-6585

QUESTION PRESENTED FOR REVIEW

MAY A UNITED STATES COURT OF APPEALS DISREGARD SUBSTANTIVE CONTROLLING STATE LAW IN A CASE IN WHICH JURISDICTION OF THE COURT IS BASED SOLELY ON DIVERSITY OF CITIZENSHIP BETWEEN THE PARTIES?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Petitioners certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

Bernard Williams, Respondent

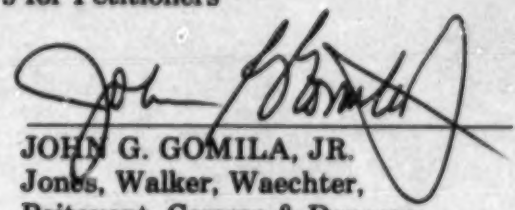
David Band, Jr., Attorney for Respondent

Shell Oil Company*—Petitioner

*Shell Oil Company is a Delaware Corporation. Of its outstanding shares of common stock, approximately 69% is of record or beneficially owned by Shell Petroleum, N.V., a Netherlands company. The voting shares of Shell Petroleum, N.V. are owned 60% by Royal Dutch Petroleum Company, The Hague, Netherlands, and 40% by The "Shell" Transport and Trading Company, Limited, London, England. Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, Limited are holding companies which together directly or indirectly own securities of companies in the Royal Dutch/Shell group, the members of which are severally engaged throughout the greater part of the world in one or more phases of the oil, chemical, coal, nuclear energy and metal industries. In addition, Shell Oil Company is affiliated with Basin Pipeline Company; Bullenbay Marine Services, N.V., Butte Pipeline Company; Capline System, Capwood Pipeline System; Crown-Shell Baytown Feeder Line System; Curacao Oil Terminal, N.V.; Dixie Pipeline Company; East Texas Salt Water Disposal Company; Explorer Pipeline Company; Gravcap, Inc.; Inland Corporation; LOCAP, Inc.; LOOP, Inc., MESBIC Financial Corporation of Houston; Oil Companies Institute for Marine Pollution Compensation Limited; Olympic Pipeline Company; Ozark Pipeline System; Penn Central Corporation; Plantation Pipeline Company; Rancho Pipeline System; Seadock, Inc.; Ship Shoal Pipeline System; Thums Longbeach Company; Westshore Pipeline Company; WIDC (Wyoming Industrial Development Corporation); and Wolverine Pipeline Company.

Insurance Company of North America—Petitioner

Jones, Walker, Waechter, Poitevent, Carrere & Denegre—Attorneys for Petitioners



JOHN G. GOMILA, JR.
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
18th Floor—225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Attorney for Petitioners
Shell Oil Company and The Insurance
Company of North America

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OPINIONS BELOW

Fifth Circuit

The opinion of the Court of Appeals denying Petition for Rehearing and Petition for Hearing En Banc, appears at Appendix, *Infra*, p. A-1.

The opinion of the Court of Appeals reversing the Judgment of the District Court is reported at 677 F.2d 506, and appears at Appendix, *Infra*, pp. A-3—A-15.

District Court

The opinion of the District Court was not reported, but the Judgment of the District Court dated August 20, 1981, appears at Appendix, *Infra*, p. A-16.

GROUNDS FOR JURISDICTION

The Judgment of the court below was entered on June 4, 1982. A Petition for Rehearing and Petition for Rehearing En Banc were timely filed and were denied on July 21, 1982. (Appendix, *Infra*, P. A-1—A-15,

This Petition for Writ of Certiorari was filed within ninety days of the date Rehearing was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PROVISIONS CONSTRUED

La. Rev. Stat. 22:1032

"The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word 'principal' shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

"Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

"The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section."

La. Rev. Stat. 23:1061

"Where any person (in this section referred to as a principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

"Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor."

STATEMENT OF THE CASE

The basis of jurisdiction herein is diversity of citizenship between the parties, 28 U.S.C. 1332(a)(1). Petitioners, Shell Oil Company and the Insurance Company of North America, both citizens of states other than Louisiana, are, respectively, the operator of a large petroleum refining complex located in Louisiana and its insurer. Respondent, Bernard Williams, was an employee of Gulf Coast Cooling Tower Service, Inc., a contractor retained by Shell Oil Company to perform certain routine maintenance operations at the refinery in question.

On August 5, 1980, while employed by Gulf Coast Cooling Tower Services, Inc. at Shell Oil Company's Norco manufacturing complex, Bernard Williams suffered an injury when an acid line burst and certain substances came in contact with his skin. At the time of the injury, Bernard Williams was working for Gulf Coast pursuant to a contract entered into between Gulf Coast and Shell for the repair and maintenance of structures known as "cooling towers", instrumentalities without which the Norco manufacturing complex can not be operated. The work being performed by Bernard Williams and his employer was of a type identical to that customarily performed by Shell's own employees. The amount of work to be done, however, was of a larger scale than that for which Shell had sufficient employees, as a result of which Shell retained the services of Gulf Coast Cooling Tower Service, Inc. to perform portions of the work.

After answer, Shell Oil Company filed a Motion for Summary Judgment, together with a supporting Memorandum and Affidavit establishing the facts shown above. Said Motion was granted by the District Judge on August 19, 1981, and was confirmed by Judgment entered on August 20, 1981.

Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the granting of Summary Judgment and which subsequently denied both a Petition for Panel Rehearing and a Petition for Rehearing En Banc.

ARGUMENT

MAY A UNITED STATES COURT OF APPEALS DISREGARD SUBSTANTIVE CONTROLLING STATE LAW IN A CASE IN WHICH JURISDICTION OF THE COURT IS BASED SOLELY ON DIVERSITY OF CITIZENSHIP BETWEEN THE PARTIES?

For more than forty years, this Court and the various Courts of Appeals have held without exception that, in cases in which the federal courts' jurisdiction is based solely upon diversity of citizenship, the applicable law is the law of the state. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). As this Honorable Court stated in *Erie:*

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power on the federal courts." 304 U.S. at 78.

Working within the guidelines of *Erie*, the federal judicial system has developed the rule that state substantive law is that declared by the highest court of the state.

Bailey v. Southern Pacific Transportation Company, 613 F.2d 1385 (5th Cir. 1980), *cert. denied* 449 U.S. 836 (1980); *Safeco Insurance Company of America v. Wetherill*, 622 F.2d 685 (3rd Cir. 1980).

Federal trial and appellate courts, sitting in diversity, have no power to question the wisdom or utility of the applicable state law, even in those instances in which the court is of the belief that the particular state law to be construed is unwise, harsh, or even clearly wrong. *Koch v. Gorrilla*, 552 F.2d 1170 (6th Cir. 1977). To allow such questioning of state law would be to afford litigants in federal diversity cases rights superior to those of litigants in state court suits, which is, of course, impermissible. A federal court sitting in diversity is required to act just as if it were a state trial or appellate court. *Erie, supra; Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), *cert. denied* 444 U.S. 931 (1979).

In the instant case, Bernard Williams invoked the diversity jurisdiction of the federal courts in pressing his claim for damages against Shell Oil Company and the Insurance Company of North America. The law of the forum, Louisiana, was therefore to be applied by the District Judge just as if the action had been brought in Louisiana's state court system. Louisiana law was equally applicable in the proceedings brought by plaintiff in the United States Court of Appeals for the Fifth Circuit, pursuant to *Erie* and its progeny. Petitioners' Motion for Summary Judgment in the District Court was based upon Louisiana

statutory law, as interpreted both by the Louisiana Supreme Court and Louisiana's intermediate appellate courts. The District Judge properly applied state law as enunciated by the legislature and interpreted by Louisiana's courts, and granted the Motion for Summary Judgment. On appeal, however, the United States Court of Appeals for the Fifth Circuit gave mere lip service to Louisiana's statutes and judicial decisions, and then proceeded to establish a new rule, wholly foreign to Louisiana, for the resolution of cases in which the "statutory employer" defense was relied upon.

Petitioners are cognizant of this Honorable Court's reluctance to become embroiled in cases involving proper interpretation of state law. Petitioners' request for relief from this Honorable Court, however, is not based upon a request for reinterpretation of Louisiana law. It is, rather based upon the Court of Appeals' having turned its back on its *Erie* obligations by declaring new law for Louisiana.

As the impropriety of the decision in the court below cannot be shown without reference to what state law is (as opposed to what the Court of Appeals may wish it to be) Petitioners must, of course, make reference to Louisiana law, but will attempt to do so as concisely as possible.

In Louisiana, workmen's compensation benefits constitute the sole remedy available to an employee injured in the service of his employer. No action in tort lies against the employer or the injured party's co-employees or super-

visors in the absence of an intentional act. La. Rev. Stat. 23:1032. The exclusive remedy protection afforded to an employer is extended to so-called "statutory employers" (principals) both by La. Rev. Stat. 23:1032 itself and by La. Rev. Stat. 23:1061, which imposes upon a principal, or statutory employer, the liability for workmen's compensation payments to injured employees of its contractors when they are injured carrying out work which is part of the trade, business or occupation of the principal. At the same time, La. Rev. Stat. 23:1061 grants to the principal the traditional immunity in tort granted to the direct employer. It is just such a grant of immunity upon which Petitioners relied in the courts below, and which was improperly denied to Petitioners by the Fifth Circuit Court of Appeals.

The Supreme Court of Louisiana has been quite consistent in establishing the standards to be met by a principal in order to claim the immunity granted by La. Rev. Stat. 23:1061 and 23:1032.

In *Barnes v. Sun Oil Company*, 362 So. 2d 761 (La. 1978), the most widely cited Louisiana Supreme Court decision on point, our Supreme Court established criteria for determining whether or not one who seeks to enjoy the status of a statutory employer is entitled to recognition as such. Plaintiff was employed by Weco Welders, Inc. (Weco) a contractor which had been engaged by Sun Oil Company (Sun) to do certain maintenance and repair work at one of Sun's oil production facilities. He was injured while

repairing a gas flow line in the course of his employment as a repair and maintenance worker at the facility. Suit was filed against Sun for tort damages allegedly resulting from the negligence of a Sun employee. Affidavits filed in support of Sun's Motion for Summary Judgment showed that throughout the United States, Sun engaged in the exploration, drilling, production, transportation, manufacture and marketing of petroleum products and that at the facility in question, Sun utilized its equipment to engage in the production and processing of such products using various equipment. The work performed by plaintiff's employer and plaintiff himself consisted of repairing and maintaining equipment necessary for the continued flow of oil and gas from the production facility. Prior to contracting with Weco, Sun performed repair and maintenance services at the facility with its own employees but due to economic feasibility and the location of the job site, Sun decided to contract out the maintenance and repair work at this particular facility.

The court noted that there was no dispute that maintenance and repair services performed by Weco at the facility in question were part of Sun's "trade, business or occupation." It was also noted that it was not disputed that Sun did not perform those tasks at the facility in question with its own employees. The court stated:

> "However, this fact alone does not prevent the labor from being part of its regular business. The effect of La. R.S. 23:1061 is that the principal shall be considered the employer of the employees of the contractor engaged in *work which is part of*

the regular business of the principal...." 362 So.2d at 764. (emphasis supplied)

The Louisiana Supreme Court, therefore, concluded without difficulty that the work being performed by plaintiff and his employer was part of the regular trade, business or occupation of Sun, making Sun the statutory employer of plaintiff. Sun was therefore found to be immune from tort liability to plaintiff and the grant of Summary Judgment was affirmed.

In *Reeves v. Louisiana and Arkansas Railway Company*, 282 So. 2d 503 (La. 1973), plaintiff was the employee of a sub-contractor engaged in the construction of a new petroleum coking unit on the premises of Humble Oil and Refining Company. The unit being constructed was a replacement for an existing coking unit situated near the work site, and plaintiff was operating a vehicle in the service of his direct employer, hauling materials to be utilized in the construction process. In defense of plaintiff's claim for damages in tort, Humble argued that the work being performed by plaintiff's direct employer was part of Humble's trade, business or occupation, as contemplated by La. Rev. Stat. 23:1061. The Louisiana Supreme Court disagreed, finding the work to be new construction rather than repairs or maintenance, and stated:

> "Humble is primarily an operating or refining company. It has never designed a coking unit or any comparable plant. It has neither the design capability nor the manpower availability for this *type work* ....

> "Thus, it was not Humble's business practice to engage in *new construction* of this type and magnitude...." 282 So.2d at 507-508. (emphasis supplied)

In *Klohn v. Louisiana Power and Light*, 406 So.2d 577 (La. 1981), the Louisiana Supreme Court also affirmed a Summary Judgment granted to a principal claiming to be a statutory employer and thereby immune from tort liability to the employee of a contractor. The evidence showed that the City of Thibodaux, Louisiana had contracted with Louisiana Power and Light to operate its electric power generating stations for a number of years prior to the time of plaintiff's injury. Plaintiff was employed by a subcontractor of Louisiana Power and Light to perform certain maintenance work on equipment at the generating station. Plaintiff argued that, since it had not operated the generating facility for a number of years, the City was no longer in the business of providing electric service, but rather chose to utilize the services of Louisiana Power and Light to provide this service to its citizens. The court recognized that fact that no City employees were involved in the maintenance or operation of the generating plant, but nonetheless affirmed the granting of Summary Judgment, stating:

> "...[T]he City did operate the electrical system for several years, and ... the City remained in the trade, business or occupation of providing electric service notwithstanding the fact that it contracted with LP&L for the execution by LP&L 'of the whole or any part of the work [it had] undertaken'. Since the City was in the trade, business

or occupation of providing electric service at the time of plaintiff's accident, and the work plaintiff was performing was in furtherance of that business, the City was a principal, or plaintiff's statutory employer ...." 406 So. 2d at 582.

In *Thompson v. South Central Bell Telephone Company*, 411 So.2d 26 (La. 1982), Summary Judgment for the statutory employer was reversed by the Louisiana Supreme Court, but the principles utilized in determining the existence of a statutory employer-employee relationship were left undisturbed. Plaintiff was employed by a contractor retained by South Central Bell Telephone Company for the purpose of breaking up concrete and digging underground pathways for telephone lines, which were to be installed later. The evidence showed that South Central Bell did not utilize its own equipment or employees to perform work of this type, although the company claimed that it did have the capability to do so had it so chosen. The evidence further showed that the company did not demolish streets, install conduits, or set poles in the ground, but rather only placed cable on the telephone poles or in the conduits which had already been installed.

Quite properly, Louisiana Supreme Court concluded that the work being performed by plaintiff's direct employed in breaking concrete and digging underground pathways was not shown to be part of the trade, business or occupation of South Central Bell Telephone Company, and Summary Judgment was reversed.

The clear import of the recent decisions of the Louisiana Supreme Court interpreting La. Rev. Stat. 23:1061 is that the key to establishing a statutory employment relationship lies in showing that the work being performed by the injured person was an integral part of the work of the principal—namely that the principal itself customarily does the same *type of work* in carrying out its operations.

This point has also been recognized repeatedly by the United States Fifth Circuit Court of Appeals in other cases in which it has been called upon to act as a Louisiana court in interpreting La. Rev. Stat. 23:1061. See, *e.g.*, *Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d 65 (5th Cir. 1980), in which the court stated:

> "The test, except in cases where the work is obviously a sub-contracted fraction of a main contract, is whether this indispensable activity is, in that business, normally carried on through employees, rather than independent contractors ....
>
> "The proper standard, as we see it, is whether the activity done by the injured employee or his actual immediate employer is part of the usual or customary practice of the principal or others in the same operational business.
>
> "More specifically, we should first consider *whether the particular principal involved in the case customarily does the type of work* performed by the contractor and whether the contractor's work is an integral part of the work customarily performed by the principal. If *either* of these situations exist, then there is a statutory employment

relationship, and the inquiry ends there." 613 F. 2d at 70-71 (emphasis supplied)

See also, *Darville v. Texaco, Inc.*, 674 F. 2d 443 (5th Cir. 1982); *Elliot v. Louisiana Power and Light Company*, 671 F. 2d 865 (5th Cir. 1982).

In all of the cited cases, which comprise the most recent jurisprudence on the subject matter which Petitioners were able to locate, both Louisiana's Supreme Court and the United States Court of Appeals for the Fifth Circuit itself recognize explicitly that the key factor is the *type of work being performed.* If the principal customarily performs, as part of its regular business, the *type of work* being performed for it by the contractor and his employee, then the contractor's employee must be found to be the statutory employee of the principal.

In this case, however, the United States Court of Appeals for the Fifth Circuit chose to turn its back both on the clear pronouncements of the Louisiana Supreme Court and upon its own prior correct interpretations of La. Rev. stat. 23:1061. The court purported to follow Louisiana law (and its own previous interpretations of it) by citing in detail recent Louisiana Supreme Court pronouncements and prior Fifth Circuit decisions. Thereafter, the court entered into an incorrect application of the facts in this case to the existing law and, as a result, carved out a new standard in statutory employer cases in a clear violation of the *Erie* doctrine.

The uncontroverted evidence in the case at bar shows that:

1. Plaintiff was employed by Gulf Coast Cooling Tower Services, Inc., which had contracted with Shell to perform repair and maintenance work on a number of cooling towers at Shell's Norco manufacturing complex.

2. The work being performed on the cooling towers was routine maintenance and repair, necessary for the continued operation of the Norco manufacturing complex.

3. Prior to and subsequent to the accident in question, Shell had within its employ persons capable of performing the identical type of maintenance and repair work as was being done by Gulf Coast and Bernard Williams.

4. Shell employees had performed the same type of work routinely and continue to date to perform the same type of work.

5. The work to be performed was of a larger scale than that for which Shell had a sufficient number of employees, as a result of which it retained the services of Gulf Coast by means of a contract.

6. It was Shell's custom to utilize its own employees for small-scale and medium-scale work of this type, but it generally utilized an outside contractor for large-scale projects, rather than maintain a large labor force which it

could not keep busy at all times.

7. The *work performed* in small-scale and large-scale projects of this type *was identical*, other than the amount of work being performed.

The facts established to support the Motion for Summary Judgment amply justified the District Judge's grant of Summary Judgment, and supported no other conclusion. The Fifth Circuit Court of Appeals, however, seized *solely* upon Shell's utilizing outside contractors for large-scale projects, ignoring a consistent line of Louisiana jurisprudence (and decisions of its own) as well as the relevant facts. The heart of the court's opinion, and its sole rationale, is stated in the following paragraph:

> "Examining the showing made by Shell to determine whether under the *Blanchard* test the work-injury activity of the plaintiff Williams or his direct employer (Gulf Coast) was part of Shell's trade, business, or occupation, we find that both the defendants' statement of uncontested facts and the affidavit of its maintenance manager state that while, Shell uses its own employees to perform small and medium scale maintenance, it *customarily contracts with outside concerns* to perform large-scale repairs, such as the job in question. In short, by its own statements, the job being done by Gulf Coast was *not that customarily or regularly performed* by Shell itself through its own employees." *Williams v. Shell Oil Company*, 677 F.2d 506, 509 (5th Cir. 1982) (emphasis in original)

The sole factor relied upon by the Fifth Circuit Court of Appeals, therefore, in clear contravention of established Louisiana authority, and therefore in violation of the *Erie* doctrine, was the *size of the job*! This is not now, and has never been, a relevant criterion in the decision of statutory employment cases. Rather, as previously established, Louisiana law is clear to the effect that it is the *type of work* performed by the injured employee which must be examined to determine if it falls within the regular business of the principal. The court below apparently concedes that the *type of work* performed by Shell's direct employees and by Bernard Williams was identical, a fact established by affidavits filed by Shell Oil Company and the Insurance Company of North America.

The effect of the decision of the court below is to make new law for Louisiana. If the decision of the Fifth Circuit Court of Appeals is allowed to stand, Louisiana judicial decisions will be of no moment, and in the federal courts decisions in statutory employment cases will depend on whether or not the principal uses its own employees for the particular project involved and for projects of similar size, rather than for work of the same type.

In no way can the decision of the Fifth Circuit Court of Appeals be reconciled with *Erie*, *Reeves*, *Barnes*, *Thompson*, or even with the Fifth Circuit Court of Appeals' own decisions in this area of the law. The decision in the instant case represents a drastic departure from settled principles of federal procedural law and Louisiana substantive

law and demands correction and reversal by this Honorable Court. Without such action in this case, *Erie* will no longer be of consequence, and the lower federal courts will feel free to make new law for the various states in diversity cases. The fact that the court below cited and purported to rely upon various Louisiana Supreme Court cases does nothing to cure its subsequent repudiation of the very principles which this decision purports to uphold.

It cannot be assumed that the rule enunciated in *Erie* will survive many attempts on its life. The principle of primacy of state law in diversity of citizenship cases requires the protection of this Court to prevent Courts of Appeal bent on achieving a particular result from establishing themselves as the arbiters of what state law *should be*, as has happened in the instant case. Reversal of the decision of the Fifth Circuit Court of Appeals, and a reinstatement of the Summary Judgment granted to Shell Oil Company and the Insurance Company of North America in this case is the only result proper under both the facts and the law.

SUMMARY OF ARGUMENT

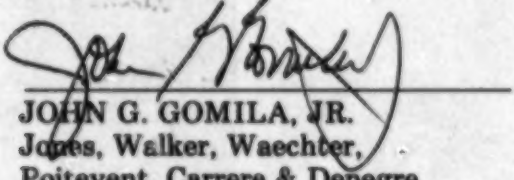
Wherefore, Petitioners, Shell Oil Company and the Insurance Company of North America, pray that a Writ of Certiorari issue and that the Judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that Judgment be entered herein reinstating the Summary Judgment granted to Petitioners by the United States District Court for the Eastern District of Louisiana.

JOHN G. GOMILA, JR.
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
18th Floor—225 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 581-6641
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the following attorney of record by placing a copy of same in the United States Mail, postage prepaid, this 19th day of October, 1981:

Mr. David Band, Jr.
Counsel for Bernard Williams
422 South Broad Street
New Orleans, Louisiana 70119



JOHN G. GOMILA, JR.
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street—18th Floor
New Orleans, Louisiana 70112
Telephone: (504) 581-6641

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3512

BERNARD WILLIAMS,

Plaintiff-Appellant,

versus

SHELL OIL COMPANY and INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 4, 1982, 5 Cir., 1982, __F.2d__).

(JULY 21, 1982)

Before WISDOM, POLITZ and TATE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member

of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor if it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "B"

Bernard WILLIAMS, Plaintiff-Appellant,

v.

SHELL OIL COMPANY and Insurance Company of North America, Defendants-Appellees.

No. 81-3512.

United States Court of Appeals, Fifth Circuit.

June 4, 1982

Employee of contractor of principal brought action against principal to recover, under theory of negligence, for injuries sustained when pressure line burst and sprayed him with acid as he was repairing one of principal's "cooling towers". The United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., Senior District Judge, granted principal's motion for summary judgment, and employee appealed. The Court of Appeals, Tate, Circuit Judge, held that genuine issue of fact as to whether specific work employee was doing was an integral part of principal's own trade, business, or occupation such that workmen's compensation would provide exclusive benefits under Louisiana law precluded summary judgment.

Reversed.

1. Workers' Compensation 2164

Under Louisiana law, a statutory employer subject to paying workmen's compensation benefits cannot be held liable in tort to injured employee of a contractor since the compensation remedy is exclusive; if, however, work being performed by the injured employee does not fall within defendant's "trade, business or occupation," exclusivity of compensation will not be a defense to a tort action brought against the principal. LSA-R.S. 23:1032, 23:1061.

2. Workers' Compensation 352

Louisiana statute governing a principal's liability for workmen's compensation benefits to a contractor's employees serves as a secondary protection for the injured worker rather than as primary remedy; thus, when work is customarily done by specialized contractors, purpose behind rule is not violated and reason for holding principal directly liable in compensation exclusively does not come into play. LSA-R.S. 23:1032, 23:1061.

3. Workers' Compensation 2239

In determining whether work performed by an injured employee of a contractor is part of trade or business of principal such that workmen's compensation is employee's exclusive remedy under Louisiana law is an issue of fact to be determined by circumstances of each case. LSA-R.S. 23:1032, 23:1061.

4. Workers' Compensation 2164

In determining, under Louisiana law, whether work performed by injured employee of subcontractor is part of trade or business of the principal such that workmen's compensation is employee's exclusive remedy, proper standard is whether activity done by the employee or his actual or immediate employer is part of usual or customary practice of the principal or others in same operational business. LSA-R.S. 23:1032, 23:1061.

5. Federal Civil Procedure 2543, 2544

Burden of proof falls on party moving for summary judgment and any doubt as to existence of a genuine issue of material fact should be resolved against movant. Fed. Rules Civ.Proc. Rule 56(c), 28 U.S.C.A.

6. Federal Civil Procedure 2515

In action brought by employee of contractor of principal to recover, under theory of negligence, for injuries sustained when pressurized line burst and sprayed him with acid as he was repairing one of principal's "cooling towers," genuine issue of fact as to whether specific work employee was doing was an integral part of principal's own trade, business, or occupation such that workmen's compensation would provide exclusive benefits under Louisiana law precluded summary judgment for principal. Fed.Rules Civ.Proc. Rule 56(c), 28 U.S.C.A.

David Band, Jr., New Orleans, La., for plaintiff-appellant.

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, John G. Gomila, Jr., New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, POLITZ and TATE, Circuit Judges.

TATE, Circuit Judge:

The plaintiff, Bernard Williams, an employee injured while working at the defendant Shell's plant, brought suit against Shell for negligence. The district court granted Shell's motion for summary judgment on the ground that Williams was the statutory employee of Shell, with an exclusive remedy under the Louisiana workmen's compensation law. The plaintiff appeals.

Bernard Williams, an employee of Gulf Coast Cooling Tower Service, Inc., was working as a carpenter at the Shell Oil Company's Norco Manufacturing Complex pursuant to a contract between Gulf Coast and Shell Oil for the repair and maintenance of the plant's "cooling towers." Williams was injured in the course of his work when a pressurized line burst, spraying him with acid and causing

chemical burns. Shell claims that the maintenance being done by the plaintiff is of a type ordinarily done by Shell's own employees, but on such a scale that Shell did not have sufficient employees to do the work itself. Shell argues that Williams's sole remedy against it is in workmen's compensation.

The central issue is whether Williams may sue Shell Oil in ordinary tort for the injuries he sustained. Williams may not sue his direct employer, Gulf Coast, because of the exclusive remedy under the workmen's compensation law. The district court found that the plaintiff was the "statutory employee" of Shell Oil at the time of the accident and granted Shell's motion for summary judgment, dismissing the plaintiff's suit. We find that there exists a genuine issue of fact as to whether the specific carpentry work Williams was doing on the cooling tower is an integral part of Shell's own trade, business, or occupation. Therefore, summary judgment was not proper in this case and we reverse.

Overview

[1] The Louisiana Workmen's Compensation Law, LSA-R.S. 23:1061[1] provides that when a principal has con-

[1] LSA-R.S. 23:1061. Principal contractors; liability.

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the prin-

tracted to have performed work "which is part of his trade, business or occupation," he shall be liable for workmen's compensation benefits to the contractor's employees. A statutory employer subject to paying compensation benefits cannot be held liable in tort to an injured employee of the contractor since the compensation remedy is exclusive. LSA-R.S. 23:1032 (Supp.1981); *Thompson v. South Central Bell Co.*, 411 So.2d 26 (La. 1982); *Thibodaux v. Sun Oil Co.*, 218 La. 453, 49 So.2d 852 (1950). If, however, the work being performed by the injured employee does not fall within the defendant's "trade, business or occupation," the exclusivity of compensation will not be a defense to a tort action brought against the principal.

[2] While much of the litigation concerning section 1061 has occurred in suits where the injured worker is claiming a tort remedy against a defendant who raises the

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(Footnote 1 continued)

cipal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

exclusivity of compensation as a defense, that was not the primary purpose of the statute. The fundamental purpose behind the liability of a principal to the employees of a contractor is to prevent principals from contracting out their work in order to evade liability for workmen's compensation benefits to the employees who actually perform the principal's business by interposing an impecunious independent contractor or subcontractor between the principal and his employee. Malone and Johnson, Louisiana Civil Law Treatise: Workers' Compensation, §§ 121-127 (2d ed. 1980). To this end, the coverage had been liberally construed. However, "it is well to keep in mind the purpose of Section 1061. Ordinarily the principal should not be subjected to the compensation claims of his contractor's employees; it should rest with the contractor. It is only when the principal seeks to avoid his compensation obligation by farming out part of his own normal operations to a contractor that an evil arises which requires exceptional treatment. Section 1061 serves as a secondary protection for the injured worker, rather than as the primary remedy." Malone and Johnson, *supra*, § 126 at 262. Thus, when work is customarily done by specialized contractors, the purpose behind the rule is not violated and the reason for holding the principal directly liable in compensation exclusively does not come into play. Malone and Johnson, *supra*, § 78 at 144, § 126 at 262.

Principal's "Trade, Business, or Occupation": The Test

[3] Whether the work performed by the injured em-

ployee is part of the trade or business of the principal is an issue of fact to be determined by the circumstances of each case. *See Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d 65, 71 (5th Cir. 1980); *see, e.g., Thompson v. South Central Bell Co., supra*, 411 So.2d 26; *Duvalle v. Lake Kenilworth, Inc.*, 396 So.2d 1268 (La.1981); *Barnes v. Sun Oil Company, 362 So.2d 761 (La.1978); Lushute v. Diesi*, 354 So.2d 179, 183 (La.1978); *Boudreaux v. Boudreaux*, 369 So.2d 1117, 1119 (La.App. 1st Cir. 1979).

[4] The standard to be applied is not a mechanical test. In considering the proper standard to apply under Louisiana law, this court in *Blanchard*, the controlling seminal precedent in this circuit, recently articulated the test for statutory employment:

> The proper standard, as we see it, is whether the activity done by the injured employee or his actual immediate employer is part of the usual or customary practice of the principal or others in the same operational business.
>
> More specifically, we should first consider whether the particular principal involved in the case customarily does the type of work performed by the contractor and whether the contractor's work is an integral part of the work customarily performed by the principal. If either of these situations exist, then there is a statutory employment relationship, and the inquiry ends there. If, however, the principal does not normally engage in this type of activity, or if it is not normally a part of his practices, then it is necessary to determine if others engaged in businesses similar to that of the principal customarily do this type of

> work or if it is an integral part of their businesses. If either of these inquiries yields an affirmative answer, then the general custom of the trade will control to make the relationship between the principal in question and his contractors' employees that of statutory employer and employee.

613 F.2d at 71.[2]

Summary Judgment

The trial court granted Shell's motion for summary judgment. Shell argues that the motion was properly granted as the work being performed by Gulf Coast formed part of the regular trade, business, or occupation of Shell Oil at its Norco complex. In support of that position, Shell claims that its own employees had performed, and continue to perform, the same type of work, but that the job in question was on a larger scale so that Shell did not have a sufficient number of employees at the plant to complete the job.[3] Williams contests the summary disposition, arguing that there are disputed issues of material fact and disputed inferences that might be properly drawn from the disputed facts. Fed.R.Civ.P. 56(c). *Winters v. Highlands Ins. Co.*, 569 F.2d 297, 299 (5th Cir. 1978).

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[2] When section 1061 is being used as a defense to tort liability, the defendant has the burden of proving that this test has been met. *Elliott v. Louisiana Power & Light Co.*, 671 F.2d 865, 867 n. 1 (5th Cir. 1982); Malone and Johnson, Louisiana Civil War Treatise: Workers' Compensation, § 126 at 259 (2d ed. 1980).

[3] The fact that Shell had employees who were capable of performing the work is not dispositive of the inquire. *Elliott v. Louisiana Power & Light Co., supra*, 671 F.2d at 867.

[5] A grant of summary judgment is appropriate only where it appears from the pleadings, depositions, admissions, answers to interrogatories, and affidavits—considered in the light most favorable to the opposing party—that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Cubbage v. Averett*, 626 F.2d 1307, 1308 (5th Cir. 1980). The burden of proof falls on the moving party (Shell) and any doubt as to the existence of a genuine issue of material fact should be resolved against the movant. *Murphy v. Georgia-Pac. Corp.*, 628 F.2d 862, 866 (5th Cir. 1980).

Application of the Blanchard Test to the Present Case

[6] Examining the showing made by Shell to determine whether under the *Blanchard* test the work-injury activity of the plaintiff Williams or his direct employer (Gulf Coast) was part of Shell's trade, business, or occupation, we find that both the defendants' statement of uncontested facts[4] and the affidavit of its maintenance manager[5] state that, while Shell uses its own employees

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[4] Shell stated in its Statement of Uncontested Facts

> That it is the custom and practice of Shell Oil Company at the Norco Manufacturing Complex to perform small-scale and medium-scale repair and maintenance work to its cooling towers by using Shell employees, and to contract with outside concerns such as Gulf Coast Cooling Tower Service, Inc. for the performance of large-scale maintenance and repair operations such as that being done on August 5, 1980.

(R. 81).

[5] Melvin Morgan stated in his affidavit

to perform small and medium scale maintenance, it *customarily contracts with outside concerns* to perform large scale repairs, such as the job in question. In short, by its own statements, the job being done by Gulf Coast was *not that customarily or regularly performed* by Shell itself through its own employees.[6] *See, e.g., Murphy v. Georgia-Pac. Corp., supra*, 628 F.2d at 866-67.

A further consideration then suggested by *Blanchard* is to inquire into the practices of the industry. Again, Shell, in its statement of uncontested facts, states

> [t]hat *it is customary* within the petroleum refining industry *to employ independent contractors* such as Gulf Coast Cooling Tower Service, Inc. to perform the type of work being performed by Gulf Coast Cooling Tower Service, Inc. on Au-

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(Footnote 5 continued)

> That it is the custom and practice of Shell Oil Company at the Norco Manufacturing Complex to perform small-scale and medium-scale repair and maintenance work to its cooling towers by using Shell employees, and to contract with outside concerns such as Gulf Coast Cooling Tower Service, Inc. for the performance of large-scale maintenance and repair operations such as that being done on August 5, 1980.

(R. 79).

[6] *Compare Barnes v. Sun Oil Co.*, 362 So.2d 761, 764 (La.1978) (Sun considered to be the employer of contractor's employees doing repair and maintenance work formerly performed by Sun's own employees, and done by direct employees of other similar employers of the geographic area) with *Duvalle v. Lake Kenilworth, Inc.*, 396 So.2d 1268, 1269 (La.1981) (case specifically distinguished from *Barnes;* from the record it appeared that the work in question was regularly done under contract with a specialty firm.)

gust 5, 1980. (Emphasis added.)[7]

The plaintiff's deposition states that this type of work is never performed by Shell employees and does not form any part of Shell's usual and customary business. The defendants argue on appeal that the plaintiff's affidavit is not based on "personal knowledge" and, therefore, does not meet the requirements of Fed.R.Civ.P. 56(e). However, we need not decide whether the district court erred in refusing to consider this deposition testimony as raising a factual dispute:

Under the factual showing of the defendant Shell itself, the work being done by the plaintiff Williams' contractor-employer was shown to be not part of Shell's trade, business, or occupation so as to constitute Shell a tort-immune employer of Williams: (1) Shell did not itself customarily perform the type of work done by Williams'

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[7] In **Duvalle v. Lake Kenilworth, Inc.**, 396 So.2d 1268 (La.1981), the supreme court reversed a summary judgment granted to a self-claimed tort-immune statutory employer. In so doing, the Louisiana Supreme Court stated, 396 So.2d at 1269:

> The affidavits and deposition filed by the parties raise material issues of fact. It cannot be determined conclusively from the evidence of record whether the pest control services performed by Dennis Miller were part of Lake Kenilworth's trade, business or occupation. From the deposition of the apartment company's property manager, it appears that application of pesticides to the apartment interiors had always been done under contract by a firm specializing in this work.

See also, to similar effect, *Thompson v. South Central Bell Telephone Company*, 411 So.2d 26 (La.1982).

immediate employer, the contractor Gulf Coast; and (2) the contractor-employer's work is not an integral part of the work customarily performed by the employees of the principal Shell.[8]

Conclusion

Accordingly, we find that the defendants have failed to sustain their burden of proving that no material issue of fact exists regarding the statutory employment relationship between Shell Oil and Williams and that summary judgment was improperly granted. Accordingly, we REVERSE the district court's grant of summary judgment.

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[8] To reiterate, the situation is distinguishable from that in *Barnes v. Sun Oil Co., supra*, 362 So.2d 761, see note 6, where the activity in which the contractor's employee was engaged in was routine repair work customarily performed by employees of the principal as well as by those of other oil companies in the area. There, summary judgment was affirmed as properly granted in upholding the principal's statutory-employer defense. In *Darville v. Texaco, Inc.*, 674 F.2d 443 (5th Cir. 1982) (1982), and in *Ortego v. Union Oil Co. of California*, 667 F.2d 1241 (5th Cir. 1982), the issue apparently posed was whether recurrent workovear or ordinary maintenance and repair work were an integral part of the defendant oil company's trade business or occupation; they did not, apparently, involve a factual showing that the type of repair work there involved was always contracted out to independent contractors by both the defendant principal and all others involved in the same trade, business, or occupation. *See, e.g., Darville, supra*, 674 F.2d at 445: "In eight of the nine refineries where vacuum trucks are used to clear the API separators, Texaco [the defendant principal] personnel are utilized in the cleaning operation [in which the plaintiff Darville was injured while working for an independent contractor employed by Texaco to perform the same work at another plant]."

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BERNARD WILLIAMS	NO. 81-171
VERSUS	CIVIL ACTION
SHELL OIL COMPANY INSURANCE COMPANY OF NORTH AMERICA	SECTION D

JUDGMENT

The Court having, on August 19, 1981, granted the motion of defendants for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Shell Oil Company and Insurance Company of North America, and against plaintiff, Bernard Williams, dismissing plaintiff's suit at his cost.

New Orleans, Louisiana, this 20th day of August, 1981.

NELSON B. JONES, CLERK

By: _____
Chief Deputy Clerk

Approved as to form:

_____
UNITED STATES DISTRICT JUDGE